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ECHOSTAR SATELLITE LLC AND
ECHOSTAR TECHNOLOGIES CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. 05-CV-1114 JW **DECLARATION OF MATTHEW I. KREEGER IN SUPPORT OF ECHOSTAR'S MOTION TO AMEND SCHEDULING ORDER** Local Rule 6-3

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I, Matthew I. Kreeger, declare and state:

1. I am a partner at Morrison & Foerster LLP, counsel of record for Defendants EchoStar Satellite LLC and EchoStar Technologies Corporation (collectively "EchoStar") in this case. Unless otherwise stated, I have personal knowledge of the matters stated below and, if called as a witness to testify, could and would do so. I make this declaration in support of EchoStar's Motion to Amend the Scheduling Order.

2. As part of the initial litigation against various Internet Defendants sued by Acacia, the Court construed the terms in the '992 and '702 patents in a July 12, 2004, *Markman* order ("*Markman* I"). After this order, numerous cable and satellite companies, including EchoStar, were consolidated with the case against the Internet Defendants as an MDL case. After the cable and satellite parties were joined, the Court held additional hearings, which culminated in its December 4, 2005, *Markman* order ("*Markman* II").

3. On February 27, 2006, this Court issued a Scheduling Order, which set out a dual-track for construing the remaining terms of the '992 patent, as well as the terms of the '275, '863, and '720 patents. First, the Court set June 2, 2006, as the hearing date to construe the disputed terms in the '992 and '275 patents. (This hearing date was later moved by the Court to June 9, 2006, and then to June 14 and 15.) Second, the Court set August 11, 2006, as the hearing date to construe the disputed terms in the '863 and '720 patents.

4. Briefing on the '863 and '720 patents is set to overlap with the schedule set for the '992 and '275 patents. For example, Defendants' briefs on the disputed terms in the '992 and '275 patents were filed on May 8, 2006.[1] That same week, the parties exchanged a list of terms to be construed from the '863 and '720 patents. The parties must disclose constructions of the terms in the '863 and '720 patents on May 26, 2006 (Acacia) and June 9, 2006 (Defendants). Acacia filed its reply brief regarding the '992 and '275 patents on May 24, 2006.[2] Acacia's reply brief

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[1] The Court approved a stipulation from the parties extending the date set for filing Defendants' briefs from May 5 to May 8.

[2] Acacia filed a stipulation on May 19, 2006, that extended the time for its reply brief from May 19 to May 24, 2006.

abandoned 6 claims in the '992 patent — Claims 47, 48, 49, 51, 52, and 53. This withdrawal eliminated any need for the Court to construe 14 additional terms or phrases.

5. The parties have a large number of disputes to present to the Court regarding the construction of the '992 and '275 patents.[3] As those disputes have crystallized, it has become apparent that many of the constructions of terms at issue in the '863 and '720 patents will be contingent on the Court's rulings on the '992 and '275 patents. For example, in addition to the 14 terms on which the Round 3 Defendants will seek reconsideration at the August 11 hearing and those below, the following terms are addressed in the '992 and '275 round of briefing and are also contained in the '863 and '720 patents: "items," "sequence of addressable data blocks," and "compressing the formatted and sequenced data blocks." In addition, the Round 1 and 2 Defendants argue in the current round of briefing that the term "receiving system" is indefinite. Whether the Court agrees, or gives the term a construction, its constructions of that and other disputed terms in '992 and '275 patents, such as "remote location selected by the user," are likely to influence its decision as to the meaning or indefiniteness of terms in the '863 and '720 patents, such as "subscriber *receiving* stations" and "subscriber *selectable* receiving stations" since the terms are arguably related.

6. Were the parties to proceed according to the current schedule, Defendants would be forced to propose contingent constructions of many confusing terms in the '863 and '720 patents — many of which are not even mentioned in the specification. For example, these patents include claim limitations for, among other things, "a central processing location," "a local distribution system," "subscriber selectable receiving stations," and "a processing station," — *none of which* is described or even mentioned in the specification. It would be inefficient, and ultimately meaningless, to construe these terms when the Court's construction of terms in the '992 and '275 patents may invalidate similar claims in the '863 and '720 patents. The parties and the Court could avoid the considerable time and expense involved in construing the terms in the

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[3] Indeed, this Court granted Defendants' request to have two full court days of claim construction hearings on the terms in the '992 and '275 patents.

'863 and '720 claims by waiting for the Court's ruling on the current round of briefing regarding the '992 and '275 patents before proceeding with constructions of the terms in the '863 and '275 patents.

7. I telephoned Alan Block, counsel for Plaintiff Acacia Media Technologies, on May 24, 2006, and proposed postponing briefing and argument on the terms of the '863 and '720 patents until after the Court rules on the terms of the '992 and '275 patents. Mr. Block stated that Acacia would oppose this request.

8. I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct and that this declaration was executed on May 30, 2006, in Denver, Colorado.

Matthew I. Kreeger